IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.37 of 2005

Nurjan Mohd. Aslam Chaudhari
Bharat Nagar Room No.116,
108/8, Near V.P. Stadium,
Lotus, Worli, Mumabi 18 .. Appellant
(Original Defd.No.3)

vs.

1. Brihanmumbai Mahanagar Palika
   G South Divisional Office.
   6th floor, Divisional Office,
   N.M.Joshi Marg, Mumbai 13. (Org. Defd.No.1)

2. Divisional Engineer,
   Brihanmumbai Electric Supply,
   B.E.S.T. Dadar (East),
   Mumbai 14 (Org. Defd. No.2)

3. Ambadas N. Warghar,
   Bharat Nagar Rom No.116,
   1/8, V.P.Stadium, Lotus,
   Worli, Mumbai 400 018.

4. S. Hindurao Mane
   Bharat Nagar, Room No.108,
   1/8A, Near V.P.Stadium,
   Lotus, Worli, Mumbai 18.

5. Shashikant Jadhav,
   Bhart Nagar, Room No.113,
   9/18, Near V.P.Stadium,
   Lotus, Worli, Mumbai 18.

6. Ramchandra Pandurang Medhekar,
   Bharat Nagar, Room No.110-1/8,
   Near V.P.Stadium, Lotus,
   Worli, Mumbai 18.

7. Sadashiv Gurav
   Bharat Nagar Room No.109,
   50/5, Near V.P.Stadium,
   Lotus, Worli, Mumbai 18.

8. Dashrath Ghadge,
   Bharat Nagar, Room No.113,
   12/18, Near V.P. Stadium,
   Lotus, Worli, Mumbai 18

9. Babu Ramchandra Shinde
   Bharat Nagar, Room NO.109,
   3/5, Near V.P. Stadium,
   Lotus, Worli, Mumbai 18

10. P.V.Gouda,
    Bharat Nagar, Room No.116,
    1/8, Near V.P.Stadium,
    Lotus, Worli, Mumbai 18 ..Respondents

Mr.P.P.Surve for the Appellant.
Mr.N.V.Walavalkar with Ms. Geeta Joglekar for Respondent No.1.
Ms. Soumya Srikrishna i/b/ Crawford Bailey for Respondent No.2.
Mr. Rajiv Chavan r/w. M/s. Lucy Massey i/b.Lucy Messay for the Respondent Nos. 3 to 10.

CORAM : A.S.OKA, J.

DATED : 12th April, 2005.

JUDGMENT :

1. Heard learned Counsel appearing for the parties. The Appeal is preferred by the Original Defendant No.3 taking exception to the Judgment and Order dated December 13, 2004 passed by the learned trial Judge. The Respondent Nos.3 to 10 are the Original Plaintiffs. The Respondent No.1 is the Defendant No.1 and Respondent No.2 is the Original Defendant No.2. By the impugned Judgment and Order the learned trial Judge has allowed the Notice of Motion No.3838 of 2004 taken out by the Original

Plaintiffs and has directed the Appellant (Defendant No.3) to stop running the flour mill in the suit structure till the disposal of the suit.

2. The case of the Original Plaintiff is that they are in possession of the residential premises being structures situated near V.P. Stadium, Worli, Mumbai which is a slum. The case made out by the Original Plaintiffs is that, the Appellant-Defendant No.3 has started a flour mill in his premises in the said area. The contention raised by the Original Plaintiff is that the flour mill is creating nuisance for them. The case is made out that the flour mill is constructed on a drainage pipe line. On the basis of the various contentions raised in the plaint the prayer for injunction is made for stopping the activity of the flour mill and for declaration that the permission granted by the Respondent No.1 Corporation in favour of the Appellant-Defendant No.3 is illegal and bad in law. The prayer is made for directing the Respondent No.2 to stop the electric supply to the flour mill. In the said suit the Notice of Motion was taken out by the Original Plaintiff for following reliefs.

(a) Pending the hearing and final

disposal of the suit that the Defendant No.3, their servants and agents or any other person or persons claiming through or under the Defendant No.3 be restrained by an order of injunction of this Hon'ble Court from running the Flour Mill by any person or the Defendant No.3 the suit premises namely the structure Bearing No.116-108/8, Bharat Nagar, Near V.P.Stadium, Lotus, Worli, 400 018 under the Electricity Supply Act 1948.

(b) Pending the hearing and final disposal of the suit, this Hon'ble Court be directing the Defendant No.2. and their servants, agents or any other person or persons claiming through or under the Defendant No.2. by an order and injunction not to work for Defendant No.3 in the residential premises viz. Zopadpatti Room No.116-108/8 Bharat Nagar, V.P.Stadium, Lotus Worli, Mumbai 400 018 under the Electricity Supply Act, 1948.

(c) Pending the hearing and final disposal of the suit, the Defendant No.3 her agents servants and/or any or persons to creating nuisance and pollution in the area by the Flour Mill or under the Defendant No.2 and 3 from making harm and may demolish the said suit structure and other structures of Bharat Nagar Zopadpatti C.T.S.No. Room No.116-108/8, Bharat Nagar, Near V.P.Stadium, Lotus, Worli, Mumbai 400 018 till the Defendant Nos.2 and 3 permanently.

3. The Notice of Motion was contested by the Appellant. Ad-interim order was passed in the said suit in favour of the original Plaintiffs which was set aside by this Court in Appeal from Order preferred by the Appellant. The trial Court appointed Court Commissioner who submitted the report. A detailed Affidavit in Reply was filed by the Appellant raising various factual and legal

contentions. He placed reliance on plan approved by the Respondent No.1 Corporation and Chief Fire Officer of the Respondent No.1 Corporation. He placed reliance on communication dated April 1,2003 issued by the Respondent No.1 by which flour mill was permitted to be installed subject to various terms and conditions. He placed reliance on permission under section 390 and 479 of the Mumbai Municipal Corporation Act, 1888 dated September 3, 2004. He also relied upon a letter of No Objection issued by the Assistant Engineer, G /South Ward of the Respondent No.1 Corporation dated April 21, 2003. There was a rejoinder filed by the Original Plaintiff. The Affidavit in reply was also filed on behalf of the Respondent No.1 Corporation. Apart from other contentions it was stated that there was a short fall of 18 cms in the distance between the structure of the flour mill and theadjoining structure. It is stated that the Deputy Municipal Commissioner (Zome III) condoned the said short fall and has recovered the premium of Rs.2000/-. It is stated in the Affidavit in Reply that various precautions has been taken to ensure that no nuisance is caused to the residents of the locality.

4. The learned trial Judge referred to the

policy dated December 27, 1976 of the Respondent No.1 Corporation for establishment of flour mills. The learned trial Judge came to the conclusion that the policy which was placed before him shows that the flour mill shall be segregated by a minimum distance of atleast 1.5 meters from the adjoining structures. He held that though it was stated by the concerned Officer of the Respondent No.1 that the policy is changed by bringing down the distance from 1.5 meters to 1 meter, no such policy was placed on record. The learned Judge held that there was nothing placed on record to show that the Dy. Commissioner of Zone II had any authority to condone the minimum segregation distance prescribed by the policy. The learned Judge also held that the report of the Environment Promotion Department does not disclose whether they had taken reading of the noise level when the flour mill was functioning. Therefore, the learned trial Judge proceeded to pass the interim order directing the Appellant to stop running of the floor mill till the disposal of the suit.

5. The learned Counsel appearing for the Appellants submitted that by the impugned Order the learned trial Judge purported to confirm the

ad-interim order passed by him which has been specifically set aside by this Court. He submitted that various conditions were imposed by the Respondent No.1 Corporation for installing the flour mill and he has complied with all the conditions which is borne out from the record. He submitted that the pleadings of the original Plaintiffs were very vague and there is no specific challenge in the Plaint to the act of condonation on the part of Deputy Commissioner. He submitted that the Appellant is running the flour mill and till the disposal of the suit he may be permitted to run the flour mill as he has made substantial compliance with in requirements precsribed by the policy of the Respondent No.1. He placed reliance on Office order issued on 18.8.2004 by the Commissioner of the Respondent No.1-Corporation which provides for delegation of various powers of the Commissioner to Deputy Commissioners and other Officers of the Respondent No.1 Corporation. He submitted that the Deputy Commissioner concerned was empowered to exercise the power of relaxation.

6. The learned counsel appearing for the Respondent No.1 has placed on record the policy dated December 27, 1976. However, the learned

Counsel could not point out any provision in the policy which permits the Commissioner of the Respondent No.1 Corporation to condone the requirement of minimum distance prescribed in the said policy. The learned Counsel appearing for the Original Plaintiffs has supported the impugned judgment and order. He has invited my attention to various findings recorded by the learned trial Court.

7. I have considered the rival submissions. The policy dated December 27, 1976 adopted by the Respondent No.1 Corporation is revised policy which lays down the procedure for establishment of the flour mills. Part D of the said policy deals with flour mills in cluster of unauthorised structure in Greater Bombay. There is no dispute between the parties that the flour mill of the Appellant will be governed by the said part D. Condition No.5 in the said part D provides that the flour mill shall be atleast at a distance of one meter from the nearest residence. It is not in dispute that on one side of the structure in which the flour mill of the Appellant is located, the distance between the structure of the flour mill and nearest residential structure is less than one meter. It is not in

dispute that the distance is 2 feet 9 inches.

8. It is to be borne in mind that the policy as formulated by the Respondent No.1 is for the benefit of the persons residing in clusters of unauthorised structures in Mumbai. The policy provides that subject to the compliance of various conditions laid down therein the business of flour mill can be commenced in such areas. Thus, the policy makes a departure from the normal rules and procedure governing grant of permission to open flour mill. As stated earlier one of the requirements of the policy is that the lour mill shall be atleast at a distance of one meter from the nearest residence. The perusal of the policy shows that there is no further power vesting in the Commissioner of the Respondent No.1 to relax the requirement of the minimum distance of one meter provided in clause 5 of part D of the said policy.

9. Reliance is placed on the circular dated 18.8.2004 by the learned Counsel appearing for the Appellant. The said circular will not help the Appellant in any manner even assuming that the powers of the Commissioner are delegated to the Deputy Commissioner by the said Circular. The said

delegation will not help the Appellant unless it is established that the Commissioner himself had power to relax the requirements laid down by the policy. As prima facie it appears to me that there is no power vested either in the Commissioner or the Deputy Commissioner of the Respondent No.1 to relax condition relating tothe minimum distance, the learned trial Judge was right in recording finding in paragraph No.12 of the impugned judgment and order that there was nothing on record to show that the Deputy Municipal Commissioner could have exercised powers of condoning the requirements laid down in the said policy.

10. The learned trial Judge has also recorded a finding in paragraph No.16 of the judgment which reads thus:

> "The report given by the Environment Protection Department does not disclose whether they had taken the reading of noise level during the course of functioning of flour kill. At least I don't find anything in the report of Environment Department to show that they have taken reading of noise level and given any findings in that regard."

11. Thus, prima facie it appears to me that the permission for opening the flour mill could not have been granted by the Respondent No.1 Corporation in

favour of the Appellant. It is true that the minimum distance which is required to be kept open is one meter and there is a shortfall in the case of the Appellant only by few inches. However, policy which is formulated by the Respondent No.1 is for protecting the residents of the locality and unless the policy itself provides for the power of relaxation vesting in any authority, the Deputy Commissioner could not have condoned and/or relaxed the conditions prescribed by the policy.

12. In this view of the matter no interference is called for with the impugned judgment and order and the Appeal from Order is accordingly dismissed.

13. It is made clear that the pending suit will be decided on its own merits. The hearing of the suit is expedited.

14. At this stage the learned Counsel appearing for the Appellant prays that ad-interim order passed on January 13, 2005 may be continued as restraint order was never operating against the Appellant. The said prayer is opposed by the learned Counsel appearing for the Original Plaintiff.

15. Considering the facts and circumstances of the case, the ad-interim order passed by this Court will continue to operate till May 20, 2005.

(A.S.Oka, J.)